IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR
Civ. No. B 038975
(Super. Ct. No. C420153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA and MARY SUE HUBBARD

Appellants,

-against-

GERALD ARMSTRONG,

Defendant.

Rec'd 11-2-89

BENT CORYDON,

Appellee.

Appeal from Superior Court of California
County of Los Angeles
Judge Bruce R. Geernaert

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Introduction

This is an appeal by the Church of Scientology of California ("Church") and Mary Sue Hubbard from an order of Superior Court Judge Geernaert vacating a prior order of Superior Court Judge Breckenridge sealing the file in this case pursuant to a settlement agreement approved by the Court. The order of Judge Geernaert which is appealed from here was entered upon the motion of a third party, Bent Corydon ("Corydon"), the appellee here, for his access to the file for use in his pending litigation with the Church. Judge Geernaert ruled summarily that any request for access must be granted automatically, and declined to consider or balance the privacy interests advanced by appellants. He granted Corydon the relief requested, and, in addition, ordered the entire court file opened to the public. Order, Nov. 9, 1988, Ex. A.*

Upon petition to this Court by appellants, Judge Geernaert's order was stayed to the extent that it permitted the general public access to the court file. The stay order, which remains in effect pending the outcome of this appeal, allows Bent Corydon and his counsel access to the file and use of it in pending litigation under the terms of a protective order. Modified Temporary Stay Order, Dec. 29, 1988, Ex. B. Corydon,

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* Exhibits are contained in Appendix of Appellants filed herewith.

having now examined the sealed file and having the opportunity to use it in his pending litigation, has thus received all the relief he sought from the Superior Court.

The issues on this appeal are whether Judge Geernaert applied erroneous legal standards when he refused to consider and weigh the appellants' privacy interests against the asserted need of Corydon for access; and whether Judge Geernaert exceeded his authority in opening the entire file to the public.

Facts and Procedural History

This lawsuit was originally brought in 1982 by the Church to recover private documents converted by defendant Gerald Armstrong ("Armstrong"). Mary Sue Hubbard intervened in the case in November, 1982 to protect her privacy interests in the documents. Armstrong filed a countersuit in September, 1982, an action which was bifurcated from the original suit in June, 1983. Shortly after the initiation of the lawsuit, Superior Court Judge Cole issued a temporary restraining order and then a preliminary injunction requiring Armstrong to submit the documents he had taken to the clerk of the court under seal.

Appellants' claims in this case were tried before Judge Breckenridge without a jury in May, 1984. At trial, appellants presented their case without introducing any of the private documents so as not to undermine the very privacy rights they

brought suit to protect. Nonetheless, at the close of trial, at Armstrong's request, and over appellants' objections, the court admitted into evidence and ordered unsealed a small percentage of the thousands of documents held under seal by the clerk on the ground that they were relevant to Armstrong's defense. These documents were unsealed, and quotations from them and information derived from them entered the trial transcript and pleading file of the case.

On June 20, 1984, Judge Breckenridge issued a Memorandum of Intended Decision, Exhibit C, which was converted into a Statement of Decision by Minute Order dated July 20, 1984. Ex. D. In the Decision, Judge Breckenridge found that appellants had proven a prima facie case of conversion, breach of confidence, breach of fiduciary relationship and invasion of privacy against Armstrong. But the court granted judgment to Armstrong on the basis of novel defenses of justification and unclean hands. Appellants appealed on both their injunctive claims (for return of the documents) and their damage claims. Although the appeal was dismissed as premature, a new appeal was instituted after the partial settlement disposed of the request for return of documents and the countercomplaint, and is still pending. Thus there is no final judgment on these claims or on the defenses Armstrong raised to them.

While Judge Breckenridge's Decision ordered certain documents the court had admitted into evidence to be unsealed, a series of appeals effectively kept these papers under seal until December 1986, when they were returned to the Church as part of the settlement agreement described below.

After lengthy negotiations, the parties presented Judge Breckenridge on December 11, 1986, with a settlement of Armstrong's countersuit and the injunctive portion of appellants' claims against Armstrong. The injunctive claims were mooted by the return to appellants of all but six of the documents [1/] -- including all documents entered into evidence. An integral, indispensable part of that settlement was the sealing of the court's record [2/] and the stolen documents still held by the

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1/ These six documents remained in the file only because issues related to privacy and privilege interests in them were the subject of other litigation. See U.S. v. Zolin, 809 F.2d 1411 (9th Cir. 1987), order for en banc hearing vacated, 842 F.2d 1135 (9th Cir. 1988), aff'd in part, vacated in part __U.S.__, 109 S.Ct. 2619, 105 L. Ed. 469, 57 U.S.L.W. 4781 (June 21, 1989), now on remand before the Ninth Circuit. These documents, however, were not admitted into evidence and were specifically ordered by Judge Breckenridge in his Decision to remain sealed. Ex. C at 1-2 & n.1. Judge Geernaert, on motion for clarification and reconsideration, maintained the seal on these documents, which are not at issue on this appeal. See infra at 7-8.

2/ Because of the court's evidentiary rulings, quotations and information from the private documents did appear in the transcript of the trial and the pleading file.

court. Tr. at 1-3. That aspect of the settlement was documented in the Stipulated Sealing Order executed and entered by Judge Breckenridge on December 11, 1986, Ex. E:

> The entire remaining record of this case, save only this order, the order of dismissal of the case, and any orders necessary to effectuate this order and the order of dismissal, are agreed to be placed under the seal of the Court.

Ex. E, ¶ 2. The countersuit was dismissed with prejudice by Judge Breckenridge on that same day, December 11, 1986. Order Dismissing Action With Prejudice, Ex. F.

On October 11, 1988, almost two years after the settlement of the case and sealing of the record, nonparty Bent Corydon filed his motion to unseal the file. Notice of Motion of Bent Corydon to Unseal File, Ex. G. His supporting papers failed to explain this lengthy delay. Corydon sought access to the Armstrong opinion and "documents admitted into evidence" for use in other litigation with the Church. Memorandum of Points and Authorities in Support of Motion of Bent Corydon to Unseal File, with attached documents,[3/] Ex. H at 5. He asserted that the documents may contain relevant information and the findings of

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[3/] The other documents submitted to the trial court at the initial briefing of this motion were: Joinder in Motion to Unseal File, October 28, 1988, Ex. I; Plaintiff's/Intervenor's and Cross-Defendant's Opposition to Motion to Unseal File, November 2, 1988, Ex. J; Reply to Opposition to Motion to Unseal File, November 7, 1988, Ex. K.

facts in the opinion may have collateral estoppel effect. Id. He moved "only for private disclosure," and not for a general opening of the file to the public. Id. at 7.

At a brief oral argument on the motion, Judge Geernaert went far beyond the limited relief requested by Corydon, and ordered that the entire file should be unsealed and opened to the public. Tr. at 17.[4/] In response to argument that the purpose of the underlying litigation was to vindicate appellants' privacy and property rights, the court explicitly ruled that a privacy interest provided no basis for sealing judicial records, and that upon the "request of any reasonably interested party," disclosure was "automatic[ ]." Tr. at 9, 12.

Judge Geernaert expressed the view that the parties to an agreement to seal a case file are on either "actual or constructive notice that the agreement will be abided by only as long as no legitimately interested party seeks to have it unsealed. . . ." Tr. at 12. He then contended that Judge Breckenridge's sealing order either implicitly included such notice or the order was "beyond his authority." Tr. at 14.

[4/] The entire argument occupies only 12 pages of transcript. Tr. at 9-20. The transcript reveals that Judge Geernaert had clearly made up his mind at the outset to provide public access to the file, although this relief was not requested and its propriety had not been addressed by the parties in their papers. Tr. at 10.

Judge Geernaert also adopted the view that "an attenuated and perfunctory showing . . . that [third parties] might find something that might be relevant to collateral estoppel" was "all they need to show" to unseal records. Tr. at 15.

Although Corydon asked only for his own access to a limited portion of the file for the purposes of his litigation, Judge Geernaert generally unsealed the entire file to the public. The court admitted it was "granting more than they've requested" because there were allegedly no grounds for a limited unsealing and because of the burden on the court of possible "further proceedings" and the burden on the clerk's office in determining if parties were authorized to have access to the file. Tr. at 18-19.

On appellants' motion for reconsideration,[5/] Judge

5/ See Plaintiffs/Intervenor's and Cross-Defendant's Motion for Clarification and/or Reconsideration to Preserve Seal on One Document Previously Held Excluded from Evidence and Held to be Protected by Attorney-Client Privilege, and Five Additional Documents Previously Excluded from Evidence and Maintained Under Seal, November 15, 1988, Ex. L; Joinder in Opposition to Reconsideration of Unsealing Order, November 22, 1988, Ex. M; Opposition to Motion to Reconsider, November 23, 1988, Ex. N; Reply to Opposition to Motion for Clarification and/or Reconsideration to Preserve Seal on One Document Previously Held Excluded from Evidence and Held to be Protected by Attorney-Client Privilege, and Five Additional Documents Previously Excluded from Evidence and Maintained Under Seal, November 28, 1988, Ex. O; Declaration of Paul Morantz, November 29, 1988, Ex. P.

Geernaert amended his order as to the six documents still held in the clerk's file. The Judge acknowledged that it would be improper to unseal documents already held under seal prior to the sealing order obtained as part of the settlement, or to unseal privileged documents. At Corydon's request, the court stated that it would create a procedure under which clerk's office personnel would supervise individuals reviewing the file Tr. at 34-35; Minute Order, Nov. 30, 1988, Ex. Q.

Judge Geernaert originally stayed his order until December 9, 1988, in order to allow for a meaningful appeal, stating "[y]ou are entitled to have this reviewed." Tr. at 16, Ex. A. The stay order later was extended through December 29, 1988. Handwritten order on cover of plaintiff's Ex Parte Application for Order Shortening Time for Hearing on Motion for Clarification and/or Reconsideration, Ex. R.[6/] Upon application by appellants, this Court entered a Temporary Stay Order on December 22, 1988, which stayed the effect of Judge Geernaert's unsealing orders "to the extent... that they unseal that court case file as to the general public and permit review thereof by any person other than moving party, Bent Corydon, and his counsel

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6/ On December 19, 1988, appellants file a Notice of Appeal, Notice of Election Under CRC Rule 5.1, and Notice of Partial Designation of Reporter's Transcript, Ex. S.

of record, Paul Morantz." Temporary Stay Order, Ex. T. That order was modified on Dec. 29, 1988, to allow access to one additional lawyer of Corydon's, and to prohibit Corydon and his counsel from disseminating the material in the file or disclosing its contents except in Corydon's pending litigation with the Church, and then only with a good faith request that the material be placed under seal. Modified Temporary Stay Order, Ex. B.

ARGUMENT

JUDGE GEERNAERT ERRED AS A MATTER OF LAW AND FACT IN LIFTING THE SEAL ON COURT RECORDS

Judge Geernaert ordered the unsealing of the court records because he believed that sealed records must be unsealed "upon the request of any reasonably interested party." Tr. at 9. He maintained that once a request for access is made, even if the asserted need for access is "attenuated and perfunctory", the court lacks the authority to deny a third party access to sealed files. Tr. at 13-14, 15. He asserted that except for a few special situations, such as those involving minors or grand jury proceedings, where closure is mandated by law, public access is "automatic[ ]" and sealing is "contrary to public policy", whatever the countervailing considerations that favor nondisclosure. Thus, he asserted that Judge Breckenridge had acted "beyond his authority" if he intended for the files to

remain shielded from full public exposure once a third party requested access. Id. at 14. In so ruling, Judge Geernaert erroneously interpreted and applied the law.

Judge Breckenridge clearly acted within his authority in sealing the court file. The United States Supreme Court has long recognized as an "uncontested" proposition that "the right to inspect and copy judicial records is not absolute" and that "[e]very court has supervisory powers over its own records and files. . . ." Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978); see also Champion v. Superior Court, 201 Cal.App.3d 777, 247 Cal.Rptr. 624, 629 (1988), quoting Estate of Hearst, 67 Cal. App. 3d 777, 783, 136 Cal. Rptr. 821, 824 (1977) ("Clearly a court has inherent power to control its own records to protect the rights of litigants before it. . . ."). 8/ The Supreme Court has explained that denial of access to judicial records may be appropriate in a variety of situations, including for the protection of privacy interests. Nixon v. Warner Communications Inc., 435 U.S. at 598.

8/ Supporting this fact is the Supreme Court's holding that the practice of permitting access to judicial records in civil cases is not mandated by the First Amendment, but rather is derived from the common law practice and is therefore not entitled to the same level of protection afforded constitutional rights. Nixon v. Warner Communications, Inc., 435 U.S. at 597-98.

The Supreme Court has affirmed that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Id. at 599. See also Estate of Hearst, 67 Cal.App.3d at 785, 136 Cal. Rptr. at 825 (lower court was "under the misapprehension it had no power to deny public access to . . . files") and Coalition Against Police Abuse v. Superior Court, 170 Cal.App. 3d 888, 904, 216 Cal.Rptr. 614, 624 (1985) (decision to seal reviewable under abuse of discretion standard).

Here, the trial judge, Judge Breckenridge, in his sound discretion, ordered the sealing of the trial record to facilitate a settlement of this case and to permit petitioners to achieve the bargained-for benefit in privacy and property for which they brought the underlying lawsuit. In vacating Judge Breckenridge's order, Judge Geernaert took the legal position that, notwithstanding any privacy claim, judicial records are "automatically" to be unsealed on the request of a reasonably interested third party. Tr. at 12. No balancing of interests was undertaken. Judge Geernaert further argued that either Judge Breckenridge actually or implicitly gave notice that the file could be unsealed in the future under this standard or his order was "beyond his authority". Id. at 13-14.

Judge Geernaert's position is incorrect as a matter of law and of fact.[9/] The courts of California, as well as the courts around the country, do not recognize an automatic right of any allegedly "legitimately interested" nonparty to unseal judicial records. Rather, where a record is ordered sealed -- either as a condition of settlement or for other reasons -- courts must balance a variety of factors to determine whether access may be required. In Estate of Hearst, 67 Cal.App.3d 777, 783, 136 Cal.Rptr. 821, 824 (1977), after recognizing the "inherent power" of a court to "control its own records to protect rights of litigants," the court held that "countervailing public policy" may dictate continuation of sealing despite the general preference for public access. Elaborating on the bases for continued sealing, the Court stated:

> [C]ountervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good.

Estate of Hearst, 67 Cal.App.3d at 783, 136 Cal.Rptr. at 824, cited approvingly in Champion v. Superior Court, 201 Cal.App.3d 777, 247 Cal.Rptr. 624, 629 (1988). In fact, the Court of Appeals explicitly criticized the lower court for its

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[9/] There is no indication anywhere in the record that the parties were on actual notice that the file would be opened if a nonparty sought to have it unsealed. The judge's assertion that the parties were on constructive notice presumably is premised on his mistaken view of the law that an "legitimately" interested third party has an unbridled right to open the file.

"misapprehension" that it did not have the power to seal files. Estate of Hearst, 67 Cal.App. at 785, 136 Cal.Rptr. at 825. Thus, Judge Geernaert's perfunctory vacatur of Judge Breckenridge's order was improper, particularly since Judge Breckenridge's decision was made with the benefit of full presentation of the facts. See San Bernardino City Unified School District v. Superior Court, 190 Cal.App. 3d 233, 240-41. 235 Cal.Rptr. 356, 361 (1987).

In this case, as Judge Breckenridge was aware in entering the sealing order, the privacy interest of appellants was exceptionally strong. This litigation was brought to protect privacy rights in documents stolen from appellants by Armstrong. Judge Breckenridge specifically found that petitioners proved a prima facie case of conversion and invasion of privacy. Appellants sought and obtained the sealing order to protect private information quoted or derived from their documents which had been admitted into evidence over their objection. Privacy rights in personal documents and information are entitled to constitutional protection in California. See, e.g., City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 268, 85 Cal.Rptr. 18, 466 P.2d 225 (1970); see also California Constitution, Article 1, § 1; Porten v. University of San Francisco, 64 Cal.App. 3d 825,

829, 134 Cal.Rptr. 839, 841 (1976). Appellants' privacy interest in this material will be irreparably harmed if the court file is opened to the public.

Judge Geernaert's decision to reverse the sealing order makes the record in a case brought to protect privacy rights and settled on that basis into a vehicle for effectuating further privacy violations. Numerous courts and commentators have inveighed against such a perverse judicial exacerbation of the very intrusion that a plaintiff seeks to remedy.

In United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980), the Court of Appeals reversed a trial court's order unsealing private Church of Scientology documents. The "single most important element" in the Court of Appeals decision was the fact that the documents had been introduced as exhibits in a hearing brought on -- as in the instant case - for the very purpose of protecting defendants' constitutional and common law right of privacy. The court noted that "it would be ironic indeed if one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those [privacy] interests simply to vindicate them." Id. at 321. The court's order to continue the seal was thus intended to neutralize the "untoward" fact that the mere "initiation of [a privacy] action itself involves the additional loss of privacy" and "normally multiplies the very effect from which relief is

sought." Id. at 307 n.52 (quoting Gavison, Privacy and the Limits of the Law, 89 Yale L.J. 421, 457 (1980), and Emerson, The Right of Privacy and Freedom of the Press, 14 Harv. C.R. - C.L.L. Rev. 329, 348 (1979), respectively). See also Note, All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records, 52 Temple L.Q. 311, 344 (1974).

In the instant case, this "most important element" is even more compelling. Appellants here made every effort to vindicate their privacy interests without doing them further damage. Whereas in Hubbard the documents were introduced into evidence by the proponents of confidentiality, in this case the proponents opposed the introduction of the documents. Perhaps even more important, while the documents in Hubbard were lawfully seized pursuant to a judicially authorized search warrant, the documents in this case were unilaterally "seized" by a private litigant without probable cause and without prior judicial review.[10/] The intrusion on privacy is therefore more severe -- and any countervailing justification for publicizing the documents and court records reflecting information from them is correspondingly weaker.

10/ The fact that some limited disclosure may have occurred does not undermine a party's privacy interests in private information and materials. In Hubbard, the documents had been available to the public for nine months before the Court of Appeals resealed them. See United States v. Hubbard, 686 F.2d 955, 956 (D.C. Cir. 1982).

Given appellants' strong privacy interests, which they sought to protect -- and believed they had protected -- by the settlement order sealing the file, there are powerful arguments why, under the required balancing of interests, the trial court should have continued the sealing of the file. Infra, Subpoint A. In addition, Judge Geernaert acted contrary to law in generally unsealing the file to the public, relief not requested by Corydon, rather than requiring particularized showings of need and determining whether limited access to specified materials was appropriate. Since Corydon has already received the access he sought, and can use the information for the purpose for which he sought it, he has no grounds on this appeal for asserting a more generalized public access. Infra, Subpoint B.

A. Public Policy Dictates That The Sealing Of The Record, Which Was Essential To The Settlement Of This Case And To The Preservation of Appellants' Privacy Interests, Should Not Be Disturbed

The transcript of the December 11, 1986 hearing makes it clear that the sealing of the court record in this case, protecting the privacy of the litigants involved, was an integral and indispensable part of the final resolution of defendant's counterclaims at the trial level. Tr. at 1-8. Unsealing this file will allow a nonparty to unravel arduous negotiations which ended with a settlement satisfactory to both sides. Tr. at 1-3.

Such an action would be in direct violation of the policy of California's courts to encourage settlements and to enforce judicially supervised settlements. Phelps v. Kozakar, 146 Cal.App.3d 1078, 1082, 194 Cal.Rptr. 872, 874 (1983); Fisher v. Superior Court, 103 Cal.App.3d 434, 437, 440-441, 163 Cal.Rptr. 47, 49, 52 (1980). The acceptance of orders sealing judicial records as necessary and proper provisions of settlement agreements is supported by reported cases containing references to such orders without criticism or comment. See, e.g., Champion v. Superior Court, 201 Cal. App. 3d 777, 247 Cal. Rptr. 624, 628 (1988) (requiring an assertion of need for continued sealing when documents are submitted to be sealed in the appellate court); Owen v. United States, 713 F.2d 1461, 1462 (9th Cir. 1983).

Indeed, some courts have held that orders sealing court records as part of the settlement of a case may be modified only "if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification." Federal Deposit Insurance Corp. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982), citing Martindell v. International Telephone & Telegraph Corp., 594 F.2d 291, 296 (2d Cir. 1979). See also Rogers v. Proctor & Gamble Co., 107 F.R.D. 351, 352-53 (E.D. Mo. 1985) (citing cases setting out standards requiring maintenance of protective orders in absence of exceptional circumstances).

In In re Franklin National Bank Securities Litigation, 92 F.R.D. 468 (E.D.N.Y. 1981), aff'd. sub nom., Federal Deposit Insurance Corp. v. Ernst & Ernst 677 F.2d 230 (2d Cir. 1982), the confidentiality order -- insisted on by one party -- was a critical factor in the settlement of the case. Two years after the case was settled and the order was entered, a nonparty moved to intervene to request that the order be modified. The district court held that the "strong public policy favoring settlements of disputes" and "the importance of the stability of judgments and settlements, argue strongly against modification of the order," and that the "[l]apse of time also works against intervenors' position." 92 F.R.D. at 472. The court stated:

> The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.

Id. at 472. The court denied the motion for modification, holding the intervenors had not presented compelling arguments that the balance of factors supporting the earlier order had shifted. Ibid. The Court of Appeals affirmed. FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).

The principles enunciated in the Franklin litigation apply here as well. Other parties to the lawsuit reached a partial settlement of the case -- which included a monetary settlement of Armstrong's cross-complaint for money damages -- in reliance on the order sealing the file. For the court to induce the settlement by entering the sealing order and now decline to enforce that order works a serious injustice on the plaintiffs. As in the Franklin litigation, the intervenor here has waited two years to seek the unsealing of the file. This unexplained lapse in time weighs heavily against unsealing the file.

Appellants here have a far stronger argument in favor of continued sealing in this case than did the parties in the Franklin litigation, who sought to seal the settlement agreement. Appellants sought and relied on the settlement order specifically to protect their privacy interests in material which was stolen from them and entered into the trial transcript and pleading file over their objections.

The public policy implications of an unsealing are underscored by the constitutional protection which the right of privacy is afforded in California, see California Constitution Article 1, § 1, against both governmental and nongovernmental invasions. Porten v. University of San Francisco, 64 Cal.App.3d 825, 829, 134 Cal.Rptr. 839, 841-42 (1976).[11/] Personal docu-

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[11/] California, in fact, provides broader constitutional pro-
(footnote continued)

ments and information derived from them clearly are protected by the right of privacy in California. See, e.g., City of Carmel-by-the-Sea v. Young, 2 Cal.3d 259, 268, 85 Cal.Rptr. 1, 466 P.2d 225 (1970); Division of Medical Quality v. Gherardini, 93 Cal.App.3d 669, 678, 156 Cal.Rptr. 55, 60-61 (1979).

When a constitutional right to privacy is implicated, the courts do not merely balance the right of privacy against the right of access to records. Rather, in such cases the judicial records are presumptively placed under seal. Cf. Richards v. Superior Court, 86 Cal.App.3d 265, 150 Cal.Rptr.77 (1978) (party producing private financial information through discovery is presumptively entitled to a protective order limiting disclosure only to counsel for the other party and only for use in that litigation). Only specific, compelling state interests can overcome that presumption--and those interests must be expressly articulated by the trial court. See Richards v. Superior Court, 86 Cal.App.3d at 272, 150 Cal.Rptr. at 81 ("substantial reason... related to the lawsuit" is required for disclosure); Britt v. Superior Court, 20 Cal.3d 844, 856 n.3, 143 Cal.Rptr.695, 702 n.3, 574 P.2d 766 (1978); Gunn v. Employment Development Dep't, 94 Cal.App.3d 658, 156 Cal.Rptr.584 (1979).

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tection for privacy rights than does the federal constitution. See, City of Santa Barbara v. Adamson, 27 Cal.3d 123, 130 n.3, 164 Cal. Rptr. 539, 543 n.3, 610 P.2d 436 (1980).

Privacy rights, along with trade secrets [12] and other limited types of rights, have long been held to warrant sealing of records. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. at 598; Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

Courts in California require a balancing of considerations where a nonparty seeks to unseal records sealed by the court on the agreement of the parties. See Champion v. Superior Court, 201 Cal.App.3d 777, 787, 247 Cal.Rptr. 624, 629 (1988), citing Estate of Hearst , 67 Cal.App. 3d 777, 136 Cal.Rptr. 821 (1977). Under the cases, it is evident that petitioners have raised substantial issues regarding the balance of considerations which were erroneously disregarded by Judge Geernaert, who believed that disclosure was "automatic[ ]" whenever a third party offered even a tenuous claim. Tr. at 12, 15.

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[12] In the analogous area of trade secrets, it is routine for courts to seal judicial records, in order to protect the very rights which parties have filed suit to vindicate. The most thorough review of the decisional law in this area states that "[t]he object of such safeguarding procedures is, of course, to prevent, so far as possible, the litigation designed to enforce rights in the trade secret from being itself destructive of secrecy and the value of the subject matter of the litigation." Annot. 62 A.L.R.2d 509, 513. Thus, cases are legion in which courts have ordered that testimony and exhibits regarding business secrets be submitted in camera, sealed and impounded. E.g., A.O. Smith Corp. v. Petroleum Iron Works Co. 73 F.2d 531, 539 n. (6th Cir. 1934) (trial and appellate records sealed); Vitro Corp. v. Hall Chemical Co., 254 F.2d 787, 788 (6th Cir. 1958) (affirming trial court order impounding transcripts, exhibits and briefs).

The courts of California have repeatedly recognized that the protection of privacy interests is a powerful reason for maintaining seals ordered either pursuant to settlement or on a party's motion. Champion v. Superior Court involved a dispute among former law partners in which confidential information was sealed by the trial court. On appeal, the parties requested that some of this material be sealed by the Appellate Court. The court noted that the parties asserted that the materials "contained 'information of a highly confidential nature which is the subject of confidential settlement agreements.'" 201 Cal. App. 3d at 786, 247 Cal.Rptr. at 629. The court granted the motion to seal, stating that it was "influenced by the parties' agreement to the procedure and by the lower court's sealing of its records." Id. (Emphasis added.)

The fact that appellants here were obliged to use the courts to protect their privacy interests is further reason to continue the seal here. Significant in this regard is Estate of Hearst, 67 Cal.App.3d 777, 136 Cal.Rptr 821 (1977). There trustees of a Hearst family trust appealed from orders unsealing and refusing to seal probate files. The trustees asserted that disclosure of the files, which contained names and addresses, would expose family members to possible terrorist attacks. The court refused to seal the file, but remanded to give the trustees the opportunity to demonstrate compelling reasons to seal

portions of the file. 67 Cal.App.3d at 785, 136 Cal.Rptr. at 825. A critical reason for the court's refusal to seal the file outright was its conclusion that the Hearst family had chosen to "employ the public powers of state courts to accomplish private ends," namely "the establishment and supervision of long-term testamentary trusts. . . ." Id. at 783, 136 Cal.Rptr. at 824. The court emphasized that the family had alternatives to reliance on the courts and could have "eschew[ed] court-regulated devices for transmission of inherited wealth and rel[ied] on private arrangements such as inter vivos gifts, joint tenancies, and so-called 'living' or grantor trusts." Id. at 783-84, 136 Cal.Rptr. at 824.

The appellants here had no such alternatives for private action. They had no mechanism for recovery of the converted documents other than bringing this lawsuit. Self-help, in the form of reseizing the documents from Armstrong, was certainly not appropriate, and no court would wish to encourage such action by penalizing a party for seeking to preserve its privacy rights through the courts.

The case of Mary R. v. B & R Corp., 149 Cal.App.3d 308, 196 Cal.Rptr. 871 (1983), provides no basis for unsealing the file here.[13/] Preservation of privacy rights undoubtedly ranks

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13/ In that case the court considered the balance which should be struck where a nonparty sought to collaterally attack the validity of a sealing order made pursuant to settlement. In (footnote continued)

far higher as a basis for keeping record sealed than does possible financial loss of a physician who is attempting to prevent a governmental agency from pursuing its statutory duties of investigatory charges of sexual molestation of a child by the physician. Compare also Brown & Williamson Tobacco Co. v.

(footnote continued from previous page)
Mary R, the underlying suit involved allegations of sexual molestation by a physician of a fourteen-year-old patient. The suit was settled, allegedly for financial consideration paid by the physician. The court ordered the court file sealed as part of the settlement. After the settlement, the state Division of Medical Quality of the Board of Medical Quality Assurance moved to intervene to unseal the records in the case in order to fulfill its statutory duty to supervise and regulate the practice of medicine in the state. The trial court denied the motion to unseal.

The appellate court remanded for reconsideration of the balance of factors to determine whether the sealing order should be upheld. Central to the Mary R. court's decision was the fact that the sealing order prevented the Division of Medical Quality from carrying out its statutory obligations to discipline misconduct of physicians. 149 Cal.App.3d at 315, 196 Cal.Rptr. at 875. No similar statutory regulatory duty exists in this case.

The court also rejected arguments that the request was untimely, holding that laches will not bar a government agency from the relief it seeks when to do so would nulify "a strong rule of policy, adopted for the public benefit." 149 Cal.App.3d at 316, 196 Cal.Rptr. at 875. Of course, Corydon does not represent any governmental agency, nor is he carrying out any governmental policy. The untimeliness of his application to unseal the record should bar the relief he seeks. See In re Franklin National Bank Securities Litigation, 92 F.R.D. 468 (E.D.N.Y. 1981), aff'd sub nom F.D.I.C. v. Ernst & Ernst, 677 F.2d 230 (2d Cir.1982).

Finally, the Mary R. court rejected the physician's argument that he might lose financial consideration allegedly paid as part of the settlement and already expended. The Court first held that there was no evidence before it that financial consideration had in fact been paid or that it was gone. The court then held that the Division's statutory obligations outweighed the potential financial loss. 140 Cal.App.3d at 317-18
(footnote continued)

F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984), where a tobacco company's concern that unsealing of records would harm the company's reputation was held not to outweigh public interest in access to judicial records. Such business considerations are very different from the privacy concerns here, which were the very reason for the initiation of the underlying case.

B. Judge Geernaert Improperly Unsealed The Entire File To The Public, When Corydon Requested Only Private Access; Having Now Received All The Access He Sought, Corydon Has No Grounds For Asserting A More Generalized Public Access; Corydon's Use Of The Files Must Continue To Be Subject To A Protective Order

Judge Geernaert relied on a generalized interest in public access to judicial records in holding that the entire file in this case should be unsealed on the "request of any reasonably interested party." Tr. at 9. Reliance on a generalized interest is a legally insufficient basis for unsealing, and failure to articulate reasons for unsealing beyond the general

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(footnote continued from previous page)
& n.4, 196 Cal.Rptr. at 877 & n.4. Here, the appellants' argument to preserve the sealing order is not primarily financial loss -- potential or proven. Rather, appellants sought the sealing order to help achieve the purpose of the entire litigation, namely the preservation of the privacy of information derived from their stolen documents.

interest in public access to judicial records "alone [requires] remand." United States v. Hubbard, 650 F.2d 293, 317 (D.C. Cir. 1980).[14/]

Reliance on a generalized public right of access as a basis for the unsealing was particularly inappropriate here, where Corydon asserted no public right of access, was not acting to vindicate any public right, and sought access only for a limited private use. Judge Geernaert's unsealing order thus not only completely disregarded the appellants' privacy interests, supra, but also invaded those interests without vindicating any interest or need asserted by Corydon.

[14/] With respect to the more limited private access sought by Corydon, Judge Geernaert also applied an incorrect legal standard when he ruled that all third parties need show to unseal records is "an attenuated and perfunctory showing ... that they might find something that might be relevant to collateral estoppel." Tr. at 15. The correct legal standard is significantly higher: one "must present evidence sufficient to support a resonable belief . . ." before obtaining even an in camera review of whether the records can be unsealed. United States v. Zolin, __ U.S.__, 109 S.Ct. 2619, 2632, 105 L.Ed. 469, 57 U.S.L.W. 4781 (June 21, 1989). See, also United States v. Goldman, 637 F.2d 664, 667 (9th Cir. 1980). Further, as discussed above, the asserted necessity for access to sealed files must be weighed against the interests which the sealing sought to effectuate. Indeed, Corydon sought access only to particular parts of the file: the court's opinion and certain documents. Ex. H at 7. Corydon gained access to the court file pursuant to and under the terms of a protective order provided in the Modified Temporary Stay Order issued by this court on December 29, 1988. Ex. B. Appellants do not at this point contest his access, as long as the terms of the protective order are maintained. Infra at 31.

Judge Geernaert's approach, which effectively would destroy the privacy right of appellants gratuitously, disregards the mandate of the courts to tailor relief appropriately to intrude as little as possible on privacy interests, and is an abuse of discretion. The history of this case itself demonstrates several instances where requests for access were dealt with by appropriately limited orders which did not unnecessarily invade privacy rights. Such an approach was required of Judge Geernaert.

This court itself, in its Modified Temporary Stay Order, Ex. B, demonstrated just such an approach. Rather than permit a wholesale foray into the files by the public, on whose behalf no necessity at all has been asserted, this court allowed Corydon and his counsel access for the limited purpose -- use in pending litigation with the Church -- presented in Corydon's moving papers.

Similarly, when this case was in the Superior Court Judge Breckenridge ruled on an application by the Department of Justice and other federal agencies for access to some of the documents submitted into court by Armstrong in connection with litigation in The Founding Church of Scientology v. Director, Federal Bureau of Investigation, et al. Civ. No. 78-0107 (D.D.C.). On February 11, 1985, Judge Breckenridge heard oral argument and ruled on a document by document basis whether each

one was privileged, whether the privilege had been waived and whether each document was relevant to the government's case. While the court permitted access to some documents (while denying access to many more), it did so only under a protective order which limited their use to the particular litigation and forbade their disclosure to the public without prior court approval. See Minute Order, Feb. 11, 1985, Ex. U, and Protective Order, February 25, 1985, Ex. V ¶¶ 2-3. The Protective Order required that any use of the documents in the litigation be under seal. Ex. V ¶ 3. In any event, the documents were not used in the Founding Church litigation, and the government returned its copies, under seal, to the Superior Court.

Another instance arose in connection with a federal tax investigation of the Church of Scientology, where the IRS filed a petition in federal district court to enforce a summons seeking access to some of the documents being held under seal in this case. United States v. Acosta, [15/] Civ. No. 85-0440 (C.D. Cal.) (Hupp, J.). Judge Hupp denied enforcement as to a number of documents on the grounds that they were not relevant to the IRS's investigation and/or they were privileged. The court ruled that some documents should be produced, but only pursuant to a strict protective order which explicitly "prohibited the IRS from disclosing them to another governmental agency except in

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[15/] The case is now captioned United States v. Zolin.

connection with a criminal tax prosecution or with the court's approval". United States v. Zolin, 809 F.2d 1411, 1414 (9th Cir. 1987). This restriction on disclosure was affirmed on appeal, id. at 1416-17, and on review by the United States Supreme Court, __ U.S. __, 109 S.Ct. 2619, 105 L.Ed. 469, 57 U.S.L.W. 4781 (June 21, 1989) it was again affirmed.

These cases illustrate an appropriate approach, with specific determinations as to the amount and type of disclosure required by the particular situation. In contrast, Judge Geernaert decided in conclusory fashion that he would generally unseal the file to the public, despite the fact that Corydon had asked for limited access only, for his private use, and had asserted no public right or need for access to the court file.

During argument on the original motion, Judge Geernaert offered two reasons why he was unsealing the entire file rather than providing the limited access which Corydon sought. First, he incorrectly asserted there were no grounds for limited access and cited an alleged burden on the court which would be created by the "foster[ing of] further proceedings." Tr. at 18. It is clear from the conduct of Judge Hupp in Zolin and Judge Breckenridge regarding the District of Columbia litigation that there are grounds for providing only limited access to private materials and that if "further proceedings" are necessary for a

determination of who should be given access to sealed documents they cannot be avoided because of the alleged burden on the court.

Judge Geernaert's second argument for general unsealing instead of limited access is no more compelling than his first, and he himself undercut his argument on the point at the hearing on reconsideration. At the first hearing, the judge contended that limited access would overburden the clerk's office by requiring its personnel to require identification from parties seeking to inspect the file. Tr. at 18. Yet at the second hearing, the judge suggested that clerk's office personnel could supervise individuals inspecting the file. Tr. at 34-35. Of course, supervising review of a file is more burdensome than requiring to see identification before permitting access to a file. The truth is that clerks' offices have long performed the job of ensuring that only those permitted by court instruction be given access to sealed records. What the judge described as a "burden" is merely the normal performance of the work of the clerk's office.

It must be noted that Corydon himself has no basis on this appeal for arguing in support of the public right of access which Judge Geernaert's order would allow. Corydon asserted no public right of access; he initiated the instant proceeding to vindicate a purely private interest in obtaining access to

specific documents in the court file for use in private litigation. He has already received more than he asked for, i.e., access to the full court file, and under the terms of this court's Modified Temporary Stay Order, Ex. B, he may use anything he thus obtains to promote his own interests in his pending litigation with the Church. He is in no position now to present himself as a vindicator of public rights or to assert a more generalized public interest on appeal than he did in the trial court.

Since no public right of access was sought or is appropriate on this record,[16/] Corydon's access must continue to be limited by the conditions imposed thus far by this court's Modified Temporary Stay Order, Ex. B. He sought access only for use in private litigation against the Church; this court's order, which permits him to use the information he obtains only in said litigation and only after making a good faith effort to have it introduced under seal, is appropriately tailored to meet his asserted need without unnecessarily invading appellants' privacy.

[16/] As discussed above, a public right of access must be balanced against the appellants' privacy interests, a balance that was not undertaken below because of the judge's belief that public access was automatic.

CONCLUSION

Petitioners have demonstrated that Judge Geernaert erred in failing to weigh the privacy interests of Appellants in nondisclosure and in ruling that public access to court files is mandated in this case. His decision should be reversed. The conditions imposed on Corydon's use of the information he has obtained by access to the lower court file under this court's Modified Temporary Stay Order must be maintained to insure that the private information in the file not be further disclosed.

Respectfully submitted,

/S/

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